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Constitutional Transformation in the EctHR: Strausbourg's Expansive Recourse to External Rules of International Law

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CONSTITUTIONAL TRANSFORMATION IN THE ECtHR: STRASBOURG’S EXPANSIVE RECOURSE TO EXTERNAL RULES OF INTERNATIONAL LAW

Julian Arato *

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“Be bright and lively in expounding; if you can’t expound, then pound it in.” . . . these words of the poet are the highest maxim for constitutional transformation through judicial interpretation.¹

– Georg Jellinek

INTRODUCTION

The European Court of Human Rights (“ECtHR”) is a constituted treaty body, created by States and charged with the exercise of public governance functions over and above them. Formally established as a judicial organ of the Council of Europe (“CoE”), the ECtHR is charged with adjudicating disputes under its discrete constituent instrument—the European Convention on Human Rights (“ECHR”).² The Court is not only relatively autonomous, essentially independent of both its Member States and the larger CoE; it is moreover extraordinarily dynamic. Indeed it has undergone a constitutional metamorphosis over its storied sixty-year tenure, resulting in a body significantly more autonomous, independent, and robust in its maturity.³ Certain important chang-

1. GEORG JELLINEK, CONSTITUTIONAL AMENDMENT AND CONSTITUTIONAL TRANSFORMATION (1906), *reprinted in* WEIMAR: A JURISPRUDENCE OF CRISIS 54, 56 (Arthur Jacobson & Bernhard Schlink eds., 2000) [hereinafter JELLINEK] (invoking Goethe: *“In Auslegen seid Frisch und munter, legt ihr’s nicht aus, so leget was unter.”*).

2. Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl, art. 19, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. While the Court is in an important sense an organ of the CoE, it is treated here in isolation from the broader organization. The Court is a more or less autonomous arm of the CoE, which vindicates the rights enshrined in its discrete constituent instrument (the European Convention on Human Rights (“ECHR”). While it maintains some marginal links to the Council, (the latter acts as a forum for the States Parties to elect judges, for example), the European Court of Human Rights (“ECtHR”) is basically independent. *See id.*; Brochure, ECtHR, The Court in brief (2010), available at http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf (last visited Mar. 3, 2012). The Court may thus be best characterized as a quasi-independent “international judicial body,” linked to the CoE, but with a relatively hermetic constitutional position in the larger organization. *See* Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 711–13 (1999) (examining independent international courts as “international judicial bodies” in isolation from their wider institutional contexts for certain analytical purposes). To the extent that this Article is about constitutional change, it is essentially concerned with the transformation of the ECtHR in its relations with its Membership, and only indirectly the larger CoE.

3. *See* Romano, *supra* note 2, at 713–16, 726, 728.; *see generally* Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*,

es to the Convention have been achieved through formal amendment by the States Parties—for example the restructuring of the Court in 1998 (Protocol 11)⁴ and 2010 (Protocol 14).⁵ At the same time, however, the constitution of the ECtHR has undergone a quieter, informal kind of development through the Court’s own practice in the discharge of its normal functions. Though the latter mode of change may attract less attention than the former, the degree of change involved can be just as dramatic.

This paper is about informal change in the constitution of the ECtHR—what might be called constitutional transformation, in contrast to formal constitutional amendment. In general, by constitutional change I mean to connote either the reordering of an organization’s internal architecture (regarding the relations between, and relative competences of, the various organs) or the expansion or limitation of the powers of the organization as a whole, vis-à-vis the States Parties, the international community at large, or even individuals directly. Unlike formal amendment, which occurs through the express decision of the member States according to a certain procedure, informal transformation occurs more subtly, through the practice of the organs of the organization coupled with the practice (or even acquiescence) of the Parties.⁶

The ECtHR is, of course, essentially a judicial body. As such the focus here is on the transformative effect of the Court’s interpretive practice—specifically its practice in interpreting its own constituent instrument, the ECHR. In the international context, treaty interpretation is supposed to proceed according to a set of positive legal rules codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”).⁷ The

12 GERM. L.J. 1057, 1073–74, 1076 (2011); Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order* (N.Y.U. Pub. Law & Legal Theory Working Paper No. 259, 2011), available at http://lsr.nellco.org/nyu_plltwp/259.

4. Protocol No. 11 to ECHR, May 11, 1994, E.T.S. No. 155 [hereinafter Protocol No. 11] (abolishing the European Commission on Human Rights, allowing individuals to apply directly to the Court, and giving compulsory jurisdiction to the Court over all disputes arising out of the ECHR).

5. Protocol No. 14 to the ECHR, May 13, 2004, C.E.T.S. No. 194 [hereinafter Protocol No. 14] (establishing a “single-judge” procedure to increase efficiency, whereby initial admissibility decisions may be made by one judge, rather than by committee of three judges, as well as providing for enhanced enforcement mechanisms in connection with the CoE—such as issuing interpretations of past judgments and/or ruling on a Respondent Party’s compliance with adverse judgments (both upon referral by the Committee of Ministers of the CoE)).

6. See JELLINEK, *supra* note 1, at 54–57.

7. Vienna Convention on the Law of Treaties, arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

techniques of interpretation codified in these two articles (“Vienna Rules”) belong to general international law—they exist independently of and externally to any particular international organization. Yet the Vienna Rules provide the default legal framework for the interpretation of an organization’s constituent instrument. If at first blush the rules appear to constrain an international judicial body’s discretion in interpreting its charter, it should be borne in mind that the rules themselves are subject to interpretation.⁸ I attempt to demonstrate, below, how the ECtHR has construed certain aspects of the Vienna Rules in an exceptionally broad fashion—thereby justifying a quite unrestrained and expansive approach to the interpretation and reinterpretation of the ECHR. I want to suggest that in doing so the ECtHR has brought about the gradual transformation of its constitution.

An objection may be raised at the outset that nothing about the Court’s interpretive practice is truly transformative in any way specific to its constitution. The ECtHR interprets the rights of the Convention as having remarkable breadth—even explicitly interpreting them as capable of evolution beyond the confines of the plain meaning of the text or the Court’s own prior case-law.⁹ But from a strictly juridical point of view it may be said that the Court is simply engaged in treaty interpretation, as is its proper function.¹⁰ From this perspective, the Court is acting well within the letter of its formal competence even in dramatically expanding the rights under its jurisdiction.¹¹ Rights expansion or limitation does not necessarily mean constitutional transformation; it is indeed a normal and necessary part of the function of all courts charged with rights-adjudication.¹² Yet the transformative potential of the ECtHR’s interpre-

8. See Kingsbury, *supra* note 3, at 1–2 (“It is something of an international law myth that there is one unified approach to interpretation that is embodied in the Vienna Convention on the Law of Treaties and shared among all tribunals.”). Kingsbury adds that “[t]he sociology of those practicing in particular courts, and the wider constituencies for those courts, is also important.” *Id.* at 2. To these considerations might be added the structural capacities of the different courts—not only their competences but also their power and authority.

9. See *e.g.*, López-Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) ¶¶ 51, 58 (1994).

10. See ECHR, *supra* note 2, art. 32.

11. *Id.* arts. 19 & 32. (granting the Court full and final authority to interpret the Convention).

12. See *e.g.*, J.H.H. WEILER, *Fundamental Rights and Fundamental Boundaries: On the conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, in THE CONSTITUTION OF EUROPE 102, 102–29 (1999); Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT’L L. 585 (2010); George Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT’L L. 509 (2010).

tive practice can be thrown into relief from a different, political perspective on its constitution—focusing on the powers of a constituted treaty-body over its constituent States.¹³ The question, from this perspective, is not whether the Court’s interpretation does or does not expand a Convention right, but rather whether its approach to interpretation entails a novel assertion of authority over the States Parties.

This article argues that the Court’s broad construction of the Vienna Rules has had a significant political impact beyond justifying an expansive approach to rights-interpretation. The way in which the Court goes about interpreting the ECHR entails an assertion about its competences vis-à-vis the States Parties—one which gets to the constitutional core of the Court’s powers and has led to the gradual transformation of its constitution over time. In order to sharpen the focus, I confine the analysis here to the Court’s use of a single technique of interpretation—VCLT Article 31(3)(c)¹⁴—in a recent landmark case concerning the freedom of association:¹⁵ *Demir & Baykara v. Turkey* (2008).¹⁶ It is not my intention to draw any rigid conclusions from a single case study; rather, I hope that a close and multifaceted reading of this important case will simply *illustrate* the hypothesis that the Court’s interpretive practice can have transformative constitutional effects.

I want to demonstrate, through analysis of *Demir & Baykara*, two distinct dimensions of the Court’s approach to interpretation under 31(3)(c). On the one hand, the case entails a dramatic evolutive treaty interpretation, whereby the Court relies on VCLT 31(3)(c) to expand the substantive rights of the Convention in light of sources external to the Convention. On the other hand, the Court gives VCLT 31(3)(c) itself an astonishingly broad construction to justify considering an extraordinary array of external sources—thereby reflexively transforming its own material competence to develop the Convention on the basis of developments outside of the Convention. In other words, from a juridical point of view, *Demir & Baykara* may simply appear as an expansive, but not outlandish, evolutive interpretation of the ECHR. From the political perspective, however, it represents a critical shift in the powers of the Court to hold the States Parties to legal instruments beyond their control.

13. Julian Arato, *Constitutionality and Constitutionalism beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 INT’L J. CONST. L. (forthcoming 2012) [hereinafter Arato, *Constitutionality and Constitutionalism*].

14. VCLT, *supra* note 7, art. 31(3)(c) (“[T]here shall be taken into account, together with the context...any relevant rules of international law applicable in the relations between the parties.”).

15. ECHR, *supra* note 2, art. 11.

16. *Demir & Baykara v. Turkey*, App. No. 34503/97, 48 Eur. H.R. Rep. 54 (2008).

A. The Transformative Potential of VCLT 31(3)(c)

Integration and dynamism are in fashion in the world of scholarship on the law of treaties. Recent interest in the rules of interpretation focuses on the possibility of dynamic interpretation and especially the problems and possibilities of interpretation in light of developments in the international normative atmosphere external to the treaty. One particular provision of the VCLT has enjoyed the limelight—the imperative Article 31(3)(c)—requiring that in the process of interpretation “there shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.”¹⁷ But what does this vague and open-textured language counsel?

Article 31(3)(c) has two broad and interconnected aspects: on the one hand it is an interpretive mechanism for “systemic integration,” permitting connections and harmonization between different legal regimes; on the other hand it justifies a degree of “evolutive” or “dynamic” interpretation over time.¹⁸ The idea of the former is that a treaty must be applied and interpreted both “against the background of the general principles of international law,”¹⁹ and by reference to other treaties where appropriate.²⁰ The *raison d’être* of this principle, according to the *Fragmentation Report* of the International Law Commission (“ILC”), is the reality of ever-proliferating treaties and their ever-growing potential for conflict and legal fragmentation.²¹ The point of systemic integration is to promote, as much as possible, harmony among regimes through interpretation.²² The idea of the “evolutive” aspect of 31(3)(c) is that under some circumstances a treaty should be interpreted in light of the normative environment of the present day, not the historical international legal system contemporaneous to the treaty’s promulgation—even if this entails develop-

17. VCLT, *supra* note 7, art. 31(3)(c).

18. Study Group of the Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* ¶ 430, Int’l Law Comm’n, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (by Martti Koskenniemi) [hereinafter *Fragmentation Report*].

19. ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 466 (Oxford Univ. Press 1961).

20. See, e.g., Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 279 (2005); Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 680, 682, 695, 698–702 (Christina Binder et al. eds., 2009).

21. *Fragmentation Report*, *supra* note 18, ¶¶ 414–17.

22. *Id.*

ing the instrument in ways not envisioned by, or arguably even at apparent odds with the text.²³

The two aspects of VCLT 31(3)(c) are connected and codependent. The propriety of interpreting and reinterpreting a treaty in light of changes in external international law depends on whether an intention to render the treaty susceptible of evolution can be imputed to the parties—on the basis of the treaty’s object and purpose²⁴ or by inference from the terminology employed (e.g. the incorporation of scientific, technical, or highly general terms).²⁵ Conversely, even where such evolutive intent may be imputed to the parties, their mere “original intention” cannot provide, of itself, the treaty’s new substantive meaning.²⁶ A dynamic interpretation grounded on VCLT 31(3)(c) should derive the treaty or treaty provision’s new meaning from the external sources considered—dynamism in the service of integration.

Article 31(3)(c) has been well studied as a technique of interpretation to achieve integration among regimes of international law—by providing for the consideration of external norms, and in some cases justifying a dynamic interpretation on their basis.²⁷ What has received much less attention is the auto-transformative effect of the use of Article 31(3)(c) by international courts and tribunals in the interpretation of *their own* constituent instruments. The way a court construes its interpretive mandate under VCLT 31(3)(c) is connected to its understanding of its own competences: to what extent does it consider itself competent to consider sources external to the treaty it is charged with interpreting? And to what extent does it assert competence to hold the Member States to external

23. *Id.* ¶ 478; McLachlan, *supra* note 20, at 316–19.; RICHARD GARDINER, TREATY INTERPRETATION 225, 276 (2009).

24. *See* Iron Rhine Railway (Belg. v. Neth.), 27 REP. INT’L. ARB. AWARDS 35, 73 (2007).

In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule.

Id.; *see also* Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 INT’L & COMP. L.Q. 501, 519 (1997).

25. *Fragmentation Report*, *supra* note 18, ¶ 478.

26. *See* Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences*, 9 LAW & PRAC. INT’L CTS. & TRIBS. 443, 466 (2010) [hereinafter Arato, *Subsequent Practice*].

27. *See, e.g.*, *Fragmentation Report*, *supra* note 18, ¶¶ 424–80; Philippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85, 101 (1998); Simma & Kill, *supra* note 20, at 696–96.

norms to which they have not clearly given their consent? By pushing the limits of the technique, a court can dramatically expand its competence to consider legal materials beyond the treaties to which it has supposedly been confined. Put another way, in the interpretive practice of international judicial bodies 31(3)(c) can act as a driver of *constitutional* transformation. In its approach to this technique, the ECtHR has engaged, consciously or not, in the transformation of its constitution.

B. Transformation in the ECtHR: Demir & Baykara

Demir & Baykara represents, on its face, the Court's exercise of one of its primary functions—the adjudication of complaints by individuals against Member States over the substantive rights in the Convention. The case concerns a dispute over Turkey's refusal to recognize the right of municipal civil servants to form a trade union, and the Turkish Court's annulment *ex tunc* of a collective agreement reached by one such union through collective bargaining with the municipal employing authority.²⁸ The question before the Court was whether these two actions violated Article 11 of the ECHR, guaranteeing the freedom of association.²⁹ The case turned on the construction of Article 11—does it apply to municipal civil servants as employees of the State?³⁰ And in the absence of any express reference, does it imply a right to bargain collectively?³¹ In deciding the case in favor of the Applicants, the Court relied on external sources via VCLT 31(3)(c).³² The Court both narrows a provision in Article 11, excepting some public officials from the exercise of the right,³³ and reads a right to bargain collectively into Article 11 in direct opposition to its prior case law.³⁴

The case is illustrative, for present purposes, because it represents both dimensions of the Court's use of VCLT 31(3)(c). As a matter of treaty interpretation, the *Demir & Baykara* Court interpreted the substance of Article 11 dynamically and expansively on the basis of developments in external sources. At the same time, from a constitutional perspective the Court's extremely broad construction of VCLT 31(3)(c) marks (and justifies) an implicit assertion of competence to consider an extraordinary variety of external international and regional sources. Such sources range

28. *Demir & Baykara v. Turkey*, App. No. 34503/97, 48 Eur. H.R. Rep. 54, ¶¶ 2, 3 (2008).

29. *Id.* ¶ 59.

30. *See id.* ¶ 53.

31. *Id.* ¶ 147.

32. *Id.* ¶¶ 65–68.

33. *See ECHR supra* note 2, art. 11(2).

34. *Demir*, 48 Eur. H.R. Rep. ¶¶ 2, 3.

from universal and binding hard law to external conventions neither signed nor ratified by the respondent State, and even to intrinsically non-binding (or “soft”) sources. The case is transformative in that it represents a qualitative shift in the Court’s line of jurisprudence gradually expanding the ambit of VCLT 31(3)(c)—by giving normative weight to standards, recommendations, and non-binding interpretations generated by purely external international organizations in the interpretation of the ECHR.³⁵ *Demir & Baykara* thus represents an assertion of competence to hold the Member States to norms they did not consent to, and cannot strictly control. *Demir & Baykara* demonstrates the transformative potential of this interpretive technique in the hands of an international judicial body engaged in interpreting its constituent instrument: by giving VCLT 31(3)(c) a broad construction, the ECtHR expands its own judicial competence to consider (and give weight to) a variety of extrinsic legal and quasi-legal sources.

In the following section I briefly sketch what I mean by the constitutional transformation of an international organization. In section two, I examine the ECtHR’s interpretation of the freedom of association in *Demir & Baykara*. I attempt to demonstrate how the Grand Chamber relies, there, on VCLT 31(3)(c) to expansively develop Article 11 of the ECHR in light of external rules of international law. In section three I examine what the Court takes to be legitimate extrinsic sources under VCLT 31(3)(c). I argue that the Court asserts an expansive competence in this regard on the basis of a surprisingly broad construction of 31(3)(c)—a construction which ultimately appears decisive in *Demir & Baykara*. By employing a particularly inclusive version of the interpretive technique, I argue, the Court asserts a broad competence to develop the Convention on the basis of an exceptionally wide array of external sources; in doing so the Court may be seen as transforming its constitutional competence vis-à-vis the States subject to its authority.

35. The Court has gradually expanded its use of VCLT 31(3)(c) through a line of previous cases. *Marckx v. Belgium* represents one of the more dramatic early expansions of the technique of interpretation: there the Court interpreted an evolutive term in the ECHR on the basis of two external treaties neither signed by all the Parties to the ECHR at that time, nor ratified by even a majority of them. *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 330, ¶ 41 (1979). By 2001, the Court was willing to rely on 31(3)(c) to justify interpreting the Convention in light of all types of sources of international law, concerning widely disparate fields of regulation (i.e. not limiting itself to treaties of the same “subject matter”). See, e.g., *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. ¶¶ 55–56 (interpreting the ECHR in light of external norms of customary international law concerning sovereign immunity in order to limit the applicability of the Convention). *Demir & Baykara* represents the particularly dramatic and illustrative capstone of this transformative line of jurisprudence. *Demir*, 48 Eur. H.R. Rep. ¶¶ 65–68.

I. CONSTITUTIONS AND CONSTITUTIONAL CHANGE

This Article does not attempt to elaborate a comprehensive theory of constitutional change in international organizations. What follows is only an analytical sketch of the concept of “the constitution” of an international organization. Especially important here are the various modes through which such constitutions change over time. To this end, I draw two distinctions: (1) between the formal and material constitutions of international organizations, and (2) between formal change (amendment) and informal change (transformation). The main concern will be the material transformative effect of the ECtHR’s interpretation of its formal constitution (the ECHR) on the basis of VCLT 31(3)(c).

A. Formal vs. Material Constitution

All international organizations, like all States, have a constitution.³⁶ In general, an international organization will have a founding instrument that defines certain aspects of its normative architecture—for example the competences of the organization, the division of powers among its organs, and its principles and purposes.³⁷ This solemn document may be called the *formal* constitution.³⁸ Necessarily in writing, a formal constitution attempts to entrench certain aspects of the organization’s structure, and in some cases certain important norms,³⁹ by making them particularly difficult to change (usually via an onerous amendment rule).⁴⁰ Yet a formal constitution is neither a necessary nor a sufficient component of a constitution in the full sense of the term.⁴¹ Even in the domestic context, states like the United Kingdom have no solemn document at all, and yet clearly possess a normative structure that articulates how and by whom laws shall be passed, interpreted, executed and enforced.⁴² If the goal of constitutional analysis is to understand how a state or organization is

36. See Arato, *Constitutionality and Constitutionalism*, *supra* note 13, Part 2.

37. See, e.g., ECHR *supra* note 2 (establishing the ECtHR); the U.N. Charter art. 1 (establishing the United Nations); International Labor Organization Constitution, art. 1, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35 (establishing the International Labour Organization).

38. See HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 124–25, 258 (1949) [hereinafter *KELSEN, GENERAL THEORY*] (articulating the notion of a formal constitution).

39. For example, the substantive rights of the ECHR, or the prohibition on the use of force and the right to self-defense, codified in the Charter of the United Nations. See U.N. Charter art. 2, para. 4 & art. 51.

40. HANS Kelsen, *PURE THEORY OF LAW* 222 (Max Knight trans., 2d ed. 1967).

41. Kelsen, *GENERAL THEORY* *supra* note 38, at 124–25, 258.

42. See ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (Roger E. Michener ed., Liberty Fund 1982) (8th ed. 1915).

“constituted”—how a system provides for the creation, interpretation, and application of legal norms, and how powers are delegated, divided and delimited—it would seem farcical to ignore foundational norms simply because they are not expressed in a solemn charter.⁴³ Likewise, even where there is some kind of founding document, no state’s formal constitution really articulates the full constitutional structure, especially over time. Some norms in the document may fall into *desuetude*, while others are expanded by legislative, executive, and judicial bodies to mean all sorts of things—often totally unanticipated by the text and sometimes at cross-purposes with other aspects of the document.

Kelsen thus classically distinguishes the *material* constitution from the purely formal document. The material constitution, in his conception, is that set of norms that dictate the methods through which norms are created, interpreted, and applied at the highest levels of the legal system.⁴⁴ The constitution may consist of a wide array of laws and customs, some perhaps enshrined in a document, and others developed through legislation, judgment, convention, or other practices of the constituted organs of government.⁴⁵ As opposed to the formal document, the material constitution describes the fundamental normative architecture within which the constituted bodies function.

The material constitution comprehends the full constitution of any organization. Nothing in it is non-constitutional, and nothing is missing from it that is constitutional for that given entity. By contrast, the formal constitution is incomplete and may include norms that would not normally be considered constitutional from the material point of view.⁴⁶ How-

43. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 35 (1993) (noting of the United States Constitution, “If we are to do justice to American realities, we must see that effective power is organized on very different lines, that it has a very different genealogy from the one set out by our paper Constitution.”).

44. KELSEN, *GENERAL THEORY* *supra* note 38, at 258.

45. For example, judicial review in the United States is mentioned nowhere in the formal constitutional document—yet the Court’s assertion since *Marbury* that it has final say over the validity of legislation under the constitution would certainly fall into the material constitutional structure of the United States. See *Marbury v. Madison*, 5 U.S. (1 Cranch) (1803) Similarly, though passed as normal legislation by a vote of 50% + 1, the Reform Act of 1832 transformed the constitution of the United Kingdom by radically overhauling the electoral system to expand representative government. See, e.g., The Great Reform Act, 1832, 2 & 3 Will. 4, c. 45 (dramatically reforming popular representation in the House of Commons by eliminating the “rotten boroughs” and significantly expanding the size of the electorate); see also JELLINEK, *supra* note 1, at 54–57.

46. See KELSEN, *GENERAL THEORY* *supra* note 38, at 125. Consider, for example, the 18th Amendment to the U.S. Constitution on prohibition which, though formally entrenched, had a dubious constitutional status from a material perspective. U.S. CONST. amend. XVIII.

ever, it bears noting that the formal document may be profoundly important in material terms, insofar as it entrenches particularly important norms and provides for authoritative interpretation or even review. Above all the interpretation of the formal constitution can have a profound material effect. But it is crucial to bear in mind that the architecture of any constituted organization will likely entail other unentrenched norms of the highest constitutional importance.⁴⁷

B. Amendment vs. Transformation

To borrow Jellinek's distinction, constitutional change can occur through two different modes: amendment and transformation.⁴⁸ Amendment should be understood to refer only to change of the formal constitutional document occurring through formal procedure (e.g. Article V of the U.S. Constitution).⁴⁹ It is an inherently intentional act, which brings about obvious changes in the constitution.

Unlike amendment of the formal constituent instrument, which depends on the willful use of formal procedures, constitutional transformation can occur through the more or less intentional (or even uncon-

47. For example, the Acts determining the composition and jurisdiction of the Supreme Court of the United States surely attain a constitutional status, because they materially affect the transmission of validity at the highest level of the hierarchy of norms. *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73 (setting the number of Justices at six), and Judiciary Act of 1869, 16 Stat. 44 (setting the number at nine). Congress has also attempted to tamper with the jurisdiction of the Court to varying degrees of success. *See, e.g.*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, *invalidated in relevant part by* Hamdan v. Rumsfeld, 546 U.S. 1149 (2006) (whereby Congress attempted to strip some of the Court's jurisdiction by providing that "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of" a Guantanamo Bay detainee). Because these constitutional norms are unentrenched, it is possible to pack the Supreme Court or remove its jurisdiction by simple statute—but the ease of making such changes through ordinary legislative procedures does not mean that they are any less changes to the constitution.

48. *See* JELLINEK, *supra* note 1, at 54.

49. The issue becomes complicated in a constitutional system lacking any kind of formal constitution, like that of the United Kingdom, where willful constitutional change must occur through ordinary legislation. I would suggest that such change should be considered constitutional transformation, and not amendment, but it is worth noting that in such systems constitutional change is *only possible* through transformation—which may be more or less willful. The situation could admittedly equally be described the other way, by calling a vote of 50% + 1 the material amendment rule. I opt for the first approach, however, because there is no way to distinguish willful constitutional amendments from more subtle and potentially unconscious transformations in such a system because *every law* is passed by 50% + 1, whether its constitutional implications are understood or not.

scious) action of the constituted bodies.⁵⁰ Transformation can occur through the organs' exercise of their delegated powers at all levels of the system (as opposed to only the constituent level)—through the enactment of important legislation, through the actions of the executive, or through interpretation by the courts.⁵¹ Moreover, it may occur through a variety of more subtle means, including longstanding usages, customs, and “conventions of the constitution.”⁵² Unlike amendment, transformation does not rely on any particular procedure; it rather connotes an effect of material change in the constitutional order, achieved through means other than the formal avenues of change.

It is important to avoid contrasting amendment and transformation in terms of degree of change.⁵³ The material effect of a constitutional transformation can be just as profound as any change achieved through formal amendment.⁵⁴ The distinction is not concerned with the extent to which amendment and transformation can bring about constitutional change; the issue is rather the processes through which such changes occur and their relative legitimacy.

It may not be immediately obvious why a court, in interpreting the formal constitution, contributes to a material *transformation*. Indeed, it may seem that the court is not transforming anything, but simply elaborating the text of the formal charter. However, as noted above, a court's interpretative practice should be viewed from two different perspectives.⁵⁵ From a juridical point of view, even an expansive or evolutive interpretation would seem to entail no constitutional change. Such an

50. By unconscious action I mean to connote actions taken towards some end, but not consciously the end of developing the constitution. It is not that the actors involved are sleepwalking, but rather that they may not perceive the constitutional implications of their actions in the pursuit of other unrelated goals.

51. See JELLINEK, *supra* note 1, at 55 (Jellinek specifically points to the Courts of the United States as a critical driver of the transformation of the U.S. Constitution).

52. This Article focuses on treaty interpretation as a mechanism for change. Full discussion of the other informal mechanisms will be confined to another paper, but suffice it to note that I mean to refer to constitutional development through non-legal means like conventions in the sense employed in British constitutional theory since Dicey. See DICEY, *supra* note 42, ch. XIV; IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 79–135 (4th ed. 1952).

53. JELLINEK, *supra* note 1, at 54–55; Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION* 13, 18–19 (Stanford Levinson ed., 1995).

54. 1 ACKERMAN, *supra* note 43.

55. See Arato, *Constitutionality and Constitutionalism*, *supra* note 13 (elaborating more fully on the distinction between a juridical and political perspective in the analysis of a constitution).

interpretation by a duly authorized court would appear as simply the expounding of what is already there. But from a political-theoretical perspective, the image may appear in a substantially different color. Instead of focusing on the juridical question of the normative result of the court's interpretation, the political lens focuses on the court's understanding of its institutional competence underlying its approach to interpretation. Where an interpretation entails a new assertion or reordering of judicial power—vis-à-vis other organs, or against the governed—the interpretation can be understood as transforming (or contributing to the transformation of) the court's constitution in a politically significant manner.⁵⁶ Depending on perspective, then, an interpretation might appear as both mere elaboration (juridically) and a dramatic transformation (politically).

In sum, amendment changes the formal constitution through the intentional use of formal procedures at the constituent level; transformation, by contrast, is a material process which entails either willful or unintended constitutional change, occurring at all levels and through a variety of mechanisms ranging from the organs' expansive exercise of their express delegated powers to less formal change over the *longue durée*.

C. Constitutional Change in International Organizations

Formal amendment is surely the most obvious (and uncontroversially legitimate) mechanism through which the constitutions of international organizations evolve over time.⁵⁷ But their material constitutions can change dramatically through less formal means as well. In some cases the constituted bodies may be able to alter or develop the material consti-

56. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) (1803) (wherein the U.S. Supreme Court asserted the power of judicial review and invalidation); *Kesavananda Bharti v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India) (wherein the Supreme Court of India asserted the power to review and invalidate duly enacted constitutional amendments). Even if these Courts attempted to ground their newly asserted powers in the formal constitution, it would be difficult to deny that these assertions amounted to monumental transformations of their respective constitutions in a material sense. Similarly, a Court might transform the constitution by dramatically reinterpreting the powers of another organ of government. See 1 ACKERMAN, *supra* note 43, at 42–44 (noting the U.S. Supreme Court's role in the transformation of the legislative power of the U.S. Congress in its New Deal jurisprudence).

57. To this category we might add amendment and modification according to the default rules of the VCLT, Articles 39–41, which provide for amendment in the absence of a formal amendment rule, or under certain conditions, the modification of a treaty between some of the parties only. VCLT, *supra* note 7, arts. 39–41. In other words, the rules on amendment and modification of treaties in the VCLT may be understood as comprising a “default amendment rule” in international law, basically akin to typical constitutional amendment and, more importantly, analytically distinct from constitutional transformation. *Id.*

tution through the exercise of juris-generative competences (where they have them).⁵⁸ In other cases such transformation may occur through longstanding usages, customs, and constitutional conventions. But especially important to the constitutional transformation of international organizations is the interpretation of their constituent instruments as international treaties—i.e. the interpretation of the constituent instrument by the constituted bodies.

The interpretation of the constituent instrument of an international organization is expected to proceed under general international law according to the rules of treaty interpretation codified in Articles 31 and 32 of the VCLT.⁵⁹ In reliance upon the Vienna Rules, a duly empowered judicial organ of an organization may render an authoritative interpretation of its own formal constitution. Insofar as such an interpretation affects the normative architecture of the organization, including the division of competences among the organs, the relationships among them, or the powers of the organization as a whole, it will entail a transformation of the constitution in a material sense—even if the interpreter insists that the formal constitution always entailed the meaning currently being ascribed to it.

The following sections attempt to illustrate the transformative effect of the ECtHR's approach to interpretation under VCLT 31(3)(c). First I elaborate the Court's dramatic evolutive interpretation of the ECHR in *Demir & Baykara*, as a juridical matter. Second I argue, from a political perspective, that the Court's expansive approach to VCLT 31(3)(c) grounds a broad assertion of its own material competence to give weight to a surprisingly wide array of external sources in the evolutive interpretation of the Convention. It is this assertion, I contend, that comprises a transformation of the material constitution of the Strasbourg Court.

58. An example is the U.N. Security Council's recent assertion of competence to enact broad, binding norms of general application under Chapter VII (e.g. Resolutions 1373 and 1540)—on the basis of only its broad mandate to “maintain international peace and security” under the Charter. *See, e.g.*, U.N. Charter, arts. 25, 39, 48; S.C. Res. 1373, U.N. Doc. S/Res/1373 (Sept. 28, 2001); S.C. Res. 1540, U.N. Doc. S/Res/1540 (Apr. 28, 2004); *see also* Arato, *Constitutionality and Constitutionalism*, *supra* note 13.

59. It is true that a constituent instrument may incorporate rules of interpretation as *lex specialis* to the Vienna Rules. VCLT, *supra* note 7, art. 5 (stating that “[i]he present Convention applies to any treaty which is the constituent instrument of an international organization . . . without prejudice to any relevant rules of the organization.”). Such rules could thus conceivably include interpretive canons as *lex specialis* to VCLT Articles 31–32. *Id.* arts. 31–32. But absent any express provisions to that effect, the presumption is that interpretation follows the VCLT, near-universally accepted as reflecting the customary international law (CIL) of treaty interpretation. Simma & Kill, *supra* note 20, at 681–83, 691, 694.

II. *DEMIR & BAYKARA* AS TREATY INTERPRETATION: THE EVOLUTION OF THE FREEDOM OF ASSOCIATION

This section presents *Demir & Baykara* by the Court's own account: as an evolutive interpretation of a Convention right on the basis of external sources. Dramatic as the reinterpretation may seem, from this juridical perspective the case appears to represent no more than the Court's exercise of its constitutionally delegated function to interpret the Convention in light of the international law of treaty interpretation.

A. *Evolutive Interpretation of the ECHR through VCLT 31(3)(c)*

The ECtHR has long considered its Convention to be a living instrument.⁶⁰ It has argued time and again that the ECHR as a whole, and its provisions individually, are susceptible of evolution under certain conditions. In the view of the Court, the Convention may evolve in a variety of circumstances. The Court has considered the provisions of the ECHR to be capable of evolving in light of changes in the practice of an overwhelming majority of the Parties ("European Consensus").⁶¹ It has also resorted to interpreting particular Convention rights dynamically where doing so appears necessary to guarantee that such rights remain practical and effective—not merely illusory—in light of changed circumstances ("*effet utile*").⁶² Most importantly here, the Court will give the Convention an evolutive interpretation in light of developments in the international and regional normative environment reflecting a more universal, if perhaps partially external, consensus about the meaning of the rights incorporated in the ECHR (for which the Court relies on VCLT 31(3)(c)).⁶³

At the same time, the Court insists that its evolutionary approach to the Convention is not an interpretive free-for-all. The Court has stated time

60. See, e.g., *Tyrer v. United Kingdom*, App. No. 5856/72, 26 Eur. Ct. H.R. (ser. A) ¶ 31 (1978); Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERM. L.J. 1730, 1731 (2011); Erik Bjorge, *National Supreme Courts and the Development of ECHR Rights*, 9 INT'L J. CONST. L. 5, 14, 29–31 (2011).

61. See, e.g., *Soering v. United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) at ¶ 102 (1989).

62. See, e.g., *Klass v. Germany*, App. No. 5029.71, 28 Eur. Ct. H.R. (ser. A) at ¶ 34 (1978).

63. *Demir & Baykara v. Turkey*, App. No. 34503/97, 48 Eur. H.R. Rep. 54, ¶ 67 (2008); *Soering*, 61 Eur. Ct. H.R. ¶ 102. It bears noting that evolutive interpretation on the basis of external norms is usually, but not always rights-expanding. For an example of a rights-limiting use of VCLT 31(3)(c), see the Court's case law concerning state immunity: *Al-Adsani v. United Kingdom*, 2001-XI, Eur. Ct. H.R. ¶¶ 55–56; *Fogarty v. United Kingdom*, 2001-XI, Eur. Ct. H.R. ¶¶ 35–36; *McElhinney v. Ireland* 2001-XI, Eur. Ct. H.R. ¶¶ 36–37.

and again that an evolutive interpretation of the Convention may expand certain rights—even dramatically—but it cannot create new rights that were not already incorporated in the instrument.⁶⁴ Not surprisingly, the distinction wears somewhat thin in practice. For example in the famous case of *López-Ostra*, the Court read a “right to a healthy environment” into the Article 8 “right to a private life,” in spite of the total lack of any textual indication that the latter provision relates to the environment.⁶⁵ It is of course perennially debatable whether such a dramatic interpretation constitutes the mere illumination of an old right, or the creation of a new one. Suffice it to say the distinction is a murky one.

In sum, the Court has long been willing to develop the Convention to bring the substance of its rights into line with external normative developments. But the stated limit is the set of rights already incorporated in the Convention. At least in principle the Court confines evolutive interpretation on the basis of external developments to the illumination and expansion of rights in the Convention, and never the creation of new rights—however mercurial the distinction appears in practice.

B. A Dynamic Interpretation of the Freedom of Association

As noted above, *Demir & Baykara* concerns a dispute over the right of municipal civil servants to unionize and bargain collectively.⁶⁶ The actual complaint arose out of a judgment by the Turkish Court of Cassation concerning a trade union of municipal civil servants formed several years prior.⁶⁷ The ECtHR divided the case into two main issues: (1) the Turkish Court’s refusal to recognize the existence of the trade union on the grounds that civil servants lack the right to unionize⁶⁸ and (2) the Court’s annulment, with retroactive effect, of the union’s collective agreement with the municipal employing authority, on grounds that there is no right to bargain collectively with the State.⁶⁹ The Court unanimously held Turkey in violation of Article 11 of the Convention (the freedom of association) on both counts: for interfering with the right of the applicants to form a trade union; and for annulling *ex tunc* its collective agreement

64. In *Johnston v. Ireland*, the Court refused to read Article 12 (the right to marry) as including the right to divorce and remarry, stating that the evolutive approach cannot go so far as to derive a right that was not included at the outset. *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) ¶ 53 (1986).

65. *López-Ostra v. Spain*, 303-C Eur. Ct. H.R. (ser. A) ¶¶ 51, 58 (1994).

66. *Demir*, 48 Eur. H.R. Rep. ¶ 3.

67. *Id.* ¶ 19.

68. *Id.* ¶¶ 87–127.

69. *Id.* ¶¶ 128–72.

with the State.⁷⁰ In reaching its conclusion, the Court relied heavily on Article 31(3)(c) to ground an evolutive interpretation of the Convention in light of changing conceptions on labor rights as reflected in international and regional instruments.⁷¹

At least on purely textual grounds, the Court's decision in *Demir & Baykara* was far from a foregone conclusion. Article 11 states, in full:

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others. *This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*⁷²

On its face, the language of ECHR 11(2) plainly qualifies the “everyone” of 11(1). The two questions before the Court, then, were first, whether Turkey could restrict the right of municipal civil servants to unionize on the grounds that as public employees they were members of “the administration of the State” whose freedom of association may be lawfully restricted; and second, whether the freedom of association includes the right to bargain collectively.⁷³

Turkey argued that all civil servants fall within the “administration of the State” exception, and therefore their freedom to associate may be qualified by the State.⁷⁴ Moreover, the government contended that even if municipal civil servants have an unqualified freedom of association, the freedom does not imply *ipso facto* a right to collectively bargain with the State.⁷⁵ Based purely on the text, Turkey had a perfectly plausible

70. *Id.* ¶¶ 2, 3.

71. *See, e.g., id.* ¶¶ 60–86 (on the interpretation of the ECHR in light of other international instruments), 98–108 (considering external instruments with regard to the question of the right for municipal civil servants to form trade unions), and 147–54 (considering external instruments in interpreting whether ECHR Article 11 includes a right to bargain collectively).

72. ECHR, *supra* note 2, art. 11 (emphasis added).

73. *Demir*, 48 Eur. H.R. Rep. ¶ 59.

74. *Id.* ¶¶ 89–91.

75. *Id.* ¶¶ 134–36.

case on both counts (whatever one may think of the substantive issues). Turkey's idea that "administration of the State" includes all state-employees seems at least as reasonable a *linguistic* construction as the opposing argument, that it includes only those at the higher levels of government who administer the state as such. As for collective bargaining, the text says nothing at all.⁷⁶ More to the point, in its prior jurisprudence, the Court expressly held that Article 11(1) does not include a right to collective bargaining. In the 1976 opinion in *Swedish Engine Drivers' Union v. Sweden*, a Chamber of the Court held that Article 11(1) "does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them."⁷⁷ The Chamber went on to note that no such right is mentioned in the Article, and "neither can it be said that . . . it is indispensable for the effective enjoyment of trade union freedom."⁷⁸

Nevertheless the Grand Chamber ruled unanimously against Turkey.⁷⁹ The Court held that the Article 11(2) exception to the freedom of association does not necessarily apply to all employees of the state in principle, and does not cover the particular applicants in *Demir & Baykara*.⁸⁰ Moreover it ruled that the right to form trade unions in Article 11(1) includes as an essential element the right to bargain collectively.⁸¹ Therefore, the Court held Turkey to be in violation of the Convention on two counts: for failing to recognize, and interfering with, the applicant civil servants' right to unionize; and for the annulment of their union's collective agreement.⁸²

The Court reasoned that it could not accept Turkey's construction of the Convention's text in large part because it was required to interpret the ECHR in light of the broader environment of external international and regional law.⁸³ In its own words, "The Court, in defining the meaning of

76. ECHR, *supra* note 2, art. 11.

77. *Swedish Engine Drivers' Union v. Sweden*, 20 Eur. Ct. H.R. (ser. A) at 627, ¶ 39 (1976).

78. *Id.* at 628.

79. *Demir*, 48 Eur. H.R. Rep. ¶¶ 2, 3.

80. *Id.* ¶¶ 97, 107.

81. *Id.* ¶ 154.

82. *Id.* ¶¶ 2, 3.

83. The Court also considered the practice of the CoE States regarding the right of civil servants to organize and the right to bargain collectively, and Turkey's own practice subsequent to the initiation of the complaint in *Demir & Baykara*. *Id.* ¶¶ 104, 124, 151, 165. It is not clear which, if any of these factors were dispositive (though the Court did devote more resources to the regional and international instruments than the others). I do not want to make the strong claim that the use of VCLT 31(3)(c) was *decisive* in the disposition of the case. The purpose here is only to demonstrate how the Court relies on

terms and notions in the text of the Convention, *can and must* take into account elements of international law other than the Convention, [as well as] the interpretation of such elements by competent organs.”⁸⁴ The Court expressly relied on VCLT 31(3)(c) to ground both its narrow construction of ECHR 11(2) and its evolutive interpretation expanding ECHR 11(1) to include collective bargaining—to bring the ECHR in line with the evolving norms of international and regional labor law.⁸⁵

Regarding the first issue, concerning who enjoys the right to organize, the Court held that the exception in Article 11(2) permitting the restriction of the freedom of association of “members . . . of the administration of the State” must be construed narrowly in light of international and regional instruments reaffirming the right of public workers to unionize.⁸⁶ Looking to the external normative environment, the Court determined that only the International Covenant on Economic, Social and Cultural Rights provides an apparent exception regarding the restriction of the right to organize like that of the ECHR concerning “members of the administration of the State.”⁸⁷ By contrast, most international instruments including the International Covenant on Civil and Political Rights and the relevant instruments of the International Labor Organization (“ILO”) recognize an unqualified right of civil servants to form trade unions (limiting exceptions to the police and armed forces).⁸⁸ The Court

external rules and principles, through the mechanism of VCLT 31(3)(c), to *justify* expanding the Convention—whether or not it makes use of other justifications. There is no use in speculating whether the outcome of the case was over-determined, or whether the Court’s consideration of these regional and international instruments may not have been decisive on their own.

84. *Demir*, 48 Eur. H.R. Rep. ¶ 85 (emphasis added).

85. *Id.* ¶ 67 (“[T]he Court has never considered the provisions of the Convention as the sole framework of references for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any *relevant rules and principles of international law applicable in relations between the Contracting Parties* . . . see also Article 31 § 3 (c) of the Vienna Convention.”) (emphasis added). Careful reading reveals two variations between the ECtHR’s rule and the phrasing of 31(3)(c): the Court adds that it will consider “principles” in addition to rules of international law, and qualifies “parties” with the designation “Contracting.” *Id.* Both of these variations are material to the Court’s expansive application of 31(3)(c), and shall be revisited in Part IV.

86. *Demir*, 48 Eur. H.R. Rep. ¶ 2.

87. *Id.* ¶ 99 (citing International Covenant on Economic, Social and Cultural Rights, art. 8(2), Dec. 16, 1966, 993 U.N.T.S. 3).

88. *Id.* ¶¶ 99–102. Here the ECtHR considers: International Covenant on Civil and Political Rights, art. 22, Dec. 19, 1966, 999 U.N.T.S. 171; Int’l Labour Org. [ILO] Convention Concerning Freedom of Association and Protection of the Right to Organise (ILO No. 87), art. 2, July 9, 1948, 68 U.N.T.S. 17; ILO Comm. of Experts on the Application of Conventions & Recommendations [CEACR], Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948

further found that regional European instruments confirm the latter view,⁸⁹ with the most recent of them, the Charter of Fundamental Rights of the European Union, going the furthest—stating in Article 12(1) that “everyone” without qualification has the right to form and join trade unions.⁹⁰

The Court determined, on the basis of the above sources, that the general rule in regional and international labor law holds that public officials enjoy the right to organize and form trade unions.⁹¹ Turning to the Convention, the Court reasoned *via* VCLT Article 31(3)(c) that ECHR Article 11 should be interpreted as being in line with the external international standards as much as the text allows; the exceptions in Article 11(2) must be strictly construed.⁹² Thus, in the opinion of the Court, civil servants are not *ipso facto* “members . . . of the administration of the State.”⁹³ Only those civil servants actually “engaged in the administration of the State as such” can be subjected, on the basis of 11(2), to a limitation of their right to form trade unions.⁹⁴ The Government had failed, in the opinion of the Court, to show that municipal civil servants in Turkey belonged to the narrow exempted category.⁹⁵

Turkey (2002), ILO Doc. No. 062002TUR087 [hereinafter CEACR, Individual Observation] (“Article 2 of the Convention provides that workers without distinction whatsoever should have the right to form and join organizations of their own choosing and that the only admissible exception under the Convention concerns the armed forces and the police.”); ILO COMM. ON THE FREEDOM OF ASSOCIATION [CFA], DIGEST OF DECISIONS AND PRINCIPLES ¶ 217 (4th ed. 1996) (“Local public service employees should be able effectively to establish organizations of their own choosing, and these organizations should enjoy the full right to further and defend the interests of the workers whom they represent.”).

89. *Demir*, 48 Eur. H.R. Rep. ¶¶ 103–04; *see* European Social Charter, art. 5, Oct. 18, 1961, 529 U.N.T.S. 89, E.T.S. No. 35 (permitting partial restrictions on police, and total or partial restrictions on the armed forces, but not for members of the administration of the state more broadly); Comm. of Ministers of the Council of Eur., Recommendation No. R (2000) 6 of the Comm. of Ministers to member states on the status of public officials in Eur., princ. no. 8 (Feb. 24, 2000), available at <https://wcd.coe.int/ViewDoc.jsp?id=340693&Site=CM> (declaring that public officials should, in principle, enjoy the right to organize *subject only to lawful restrictions so far as is necessary for the proper exercise of their public functions*).

90. *Demir*, 48 Eur. H.R. Rep. ¶ 105 (citing Charter of Fundamental Rights of the European Union, art. 12(1), 2000 O.J. (C 364) 11).

91. *Id.* ¶¶ 96–108.

92. *Id.* ¶¶ 97, 107–08.

93. *Id.* ¶ 107.

94. *Id.* ¶ 97.

95. *Id.* ¶¶ 107, 108, 154. The Court added that even if Turkey had shown that the applicants belonged to the group “members of the administration of the state,” the government would not be able to simply deny such workers the right to organize out of

As to the second issue, the Court's opinion with regard to collective bargaining was even more dramatic because it represented an outright departure from prior case law. The Court did not explicitly reverse its earlier decision in *Swedish Engine Drivers*; rather it held that the Convention had evolved in the intervening years in light of developments in external law. The Court first looked to international sources, focusing above all on ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively.⁹⁶ The ILO Convention enshrines workers' right to collectively bargain through their associations. True, the Court notes, Convention No. 98 states that it "does not deal with the position of public servants engaged in the administration of the State."⁹⁷ However, the Court stresses, this exemption provision has been interpreted narrowly by the ILO's Committee of Experts to exclude only those officials who are directly employed in the administration of the State—not all public officials as such (parallel to the Court's own interpretation of the application of Article 11 to public servants).⁹⁸ The Court thus expressly relied here upon Convention No. 98 *as interpreted* by the ILO Committee of Experts.⁹⁹ In addition, the Court found that certain European instruments confirm the right of all unions to bargain collectively, including those representing public servants—relying in particular on the European Social Charter (Article 6(2)) and the European Union's Charter of Fundamental Rights (Article 28).¹⁰⁰ In light of these developments, the Court opted to reconsider its case law on whether the right to bargain collectively constitutes an inherent element of Article 11 of the ECHR "so as to take account of the perceptible evolution in such matters."¹⁰¹ In light of developments in regional and international law, the Court held,

hand—it would have to demonstrate that such restriction of the particular applicant's rights was, *inter alia*, "necessary in a democratic society," (11(2)) which Turkey had failed to do. *Id.* ¶¶ 119–27. The Court stressed, after all, that the "exceptions set out in Article 11 are to be construed strictly." *Id.* ¶ 97. In determining necessity, the Court continued, "States have only a limited margin of appreciation." *Id.* ¶ 119.

96. *Id.* ¶ 147.

97. Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively art. 6, July 1, 1949, ILO No. 98, 96 U.N.T.S. 257 [hereinafter ILO Convention No. 98].

98. *Demir*, 48 Eur. H.R. Rep. ¶ 43; see ILO, Comm. of Experts, *General Survey of the Repts. on the Freedom of Association and the Right to Organise Convention (N. 87), 1949 and the Right to Organise and Collective Bargaining Conventions (No. 98), 1949*, ¶ 200, 81st Sess. (1994) [hereinafter ILO, *General Survey*], available at [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1994-81-4B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf).

99. *Demir*, 48 Eur. H.R. Rep. ¶ 147.

100. *Id.* ¶¶ 149–50.

101. *Id.* ¶ 153.

Article 11 has come to include today what it did not in 1976: “the right to bargain collectively with the employer has, in principle, *become* one of the essential elements of the ‘right to form and to join trade unions for the protection of [one’s] interests’ set forth in Article 11 of the Convention.”¹⁰²

In reaching both conclusions, the Court’s interpretation amounted to a dramatic evolutionary interpretation of the Convention on the basis of VCLT 31(3)(c). Regarding the rights of public workers, the Court’s interpretation thoroughly narrowed a textual restriction on the freedom to associate—expanding the right’s ambit to cover most public employees. The imputation of the right to collectively bargain represented an even more expansive and more explicit development of the Convention. In both instances, the Court relied on 31(3)(c) to develop the Convention progressively—to bring it into line with the broader framework of international labor law.

III. *DEMIR & BAYKARA* AS CONSTITUTIONAL TRANSFORMATION: AN EXPANSION OF COMPETENCE THROUGH CONSTRUCTION OF 31(3)(C)

A closer examination of *Demir & Baykara* illuminates the more complex and reflexive constitutional meaning of the Court’s interpretive approach. The case is illustrative, not simply of how the ECtHR expansively interprets the Convention on the basis of external rules, but as a thorough articulation of the Court’s approach to applying VCLT 31(3)(c) more generally. Indeed *Demir & Baykara* reflects the Court’s assertion of a broad competence to consider a wide array of external sources in determining whether and how to dynamically interpret the Convention, grounded in an extraordinarily broad construction of the technique of treaty interpretation codified in VCLT 31(3)(c). The Court’s auto-expansion of its competences represents a significant transformation of its material constitution.

The issue is not whether the Court is or is not formally competent to consider external sources—under the express terms of the Convention, that question is for the Court to decide. Article 32(1) of the ECHR formally delimits the competence of the Court, granting it jurisdiction over “all matters concerning the interpretation and application of the Convention and the Protocols thereto.”¹⁰³ The immediately following paragraph makes clear that it is for the Court itself to decide precisely how far ECHR 32(2) extends: “In the event of a dispute as to whether the Court

102. *Id.* ¶ 154.

103. ECHR, *supra* note 2, art. 32(1).

has jurisdiction, the Court shall decide.”¹⁰⁴ Thus, as a formal matter the constituent instrument of the ECtHR expressly grants the Court judicial *Kompetenz-Kompetenz*—it leaves the Court competent to decide its own competence by interpreting its jurisdictional capacity granted by 32(1).¹⁰⁵ The deeper question, in material terms, is what the Court actually makes of its open textured competence, and upon what justification. Whether or not the auto-expansion of its competences is formally justified, new and expansive assertions of such competence may represent a significant transformation of the constitution in a material sense. From a juridical point of view, it would appear that by considering external sources the Court would be simply exercising its competence consistent with its formal constitution. From a political-theoretical perspective, however, the more expansively the Court asserts its capacity to consider external sources, the more power and authority the Court asserts over those whom it governs—the parties to the ECHR.

As should be clear from the foregoing, the Court considers its competence to extend to the interpretation of the Convention generally in light of the Vienna Rules of interpretation.¹⁰⁶ On the basis of 31(3)(c) in particular, the Court has considered itself competent to interpret the Convention dynamically in light of developments in external rules of international law.¹⁰⁷ But how far does the Court consider this competence to extend? As *Demir & Baykara* makes abundantly clear, the Court interprets VCLT 31(3)(c) as extremely broad, justifying its reliance on an astonishing range of external legal and quasi-legal sources in the interpretation of the Convention. Though formally the Court may have always enjoyed such a broad formal-juridical competence by virtue of Article 32(2) of the ECHR, what is critical is the material extent to which the Court actually asserts its competence. Crucial as well is how the Court justifies said assertion—on the basis of and in terms of the international law of treaty interpretation.

To illustrate the full breadth of the ECtHR’s construction of 31(3)(c) in *Demir & Baykara*, it is helpful to break the rule down into its elements.

104. *Id.* art. 32(2).

105. See J.H.H. WEILER, *The Autonomy of the Community Legal Order*, in THE CONSTITUTION OF EUROPE, *supra* note 12, at 286, 312 (distinguishing between two senses of *Kompetenz-Kompetenz*: the legislative *Kompetenz-Kompetenz* (“the power [of a body] to extend its own jurisdiction”) and the judicial *Kompetenz-Kompetenz* (“the power to be the ultimate arbiter of disputes concerning the extent of those limited competences”).

106. See *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) ¶ 35 (1975).

107. See, e.g., *Marckx v. Belgium*, 31 Eur. H.R. (ser. A) ¶ 41 (1979); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. ¶¶ 55–56; *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. ¶¶ 35–36; and *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. ¶¶ 36–37.

The Article, to repeat, states that “There shall be taken into account, together with the context . . . (c) any relevant rules of international law applicable in the relations between the parties.”¹⁰⁸ The scholarship tends to treat the rule as having three main components—it is permissible to consider sources that are (i) “relevant,” (ii) “rules of international law,” and (iii) “applicable in relations between the parties.”¹⁰⁹ Each of these components may be read on a gradient from narrow to broad. As *Demir & Baykara* makes clear, the ECtHR’s expansive approach pushes the limits of each element of the rule. This broad construction of Article 31(3)(c) proves material to the decision in *Demir & Baykara*, and indeed appears decisive with regard to interpreting the right to bargain collectively into Article 11.

A. “Relevant” Rules

Simma and Kill note that the term “relevant” is an amorphous expression, “that lends itself to extremes of gradation and a substantive lack of clarity.”¹¹⁰ Some suggest that the term should be construed as confining VCLT 31(3)(c) to the consideration of only those rules that are “directly applicable to the subject-matter of the case.”¹¹¹ The general consensus in more recent scholarship seems to be, however, that relevance cannot be so narrowly construed. Gardiner proposes a broader view of the term, “as referring to those [rules] touching on the same subject matter as the treaty provision or provisions being interpreted *or which in any way affect that interpretation.*”¹¹² Simma and Kill support the broad view, relying largely on the International Court of Justice’s (“ICJ”) use, in the *Mutual Assistance in Criminal Matters* case, of a 1977 Treaty of Friendship, Navigation, and Commerce between France and Djibouti as a “relevant rule” within the meaning of VCLT 31(3)(c) for the interpretation of a 1986 Convention between those States on Mutual Assistance in Criminal

108. VCLT, *supra* note 7, art. 31(3)(c).

109. Simma & Kill, *supra* note 20, at 695; GARDINER, *supra* note 23, at 259–60; *see also Fragmentation Report*, *supra* note 18, ¶ 426.

110. Simma, *supra* note 20, at 695; GARDINER, *supra* note 23, at 258, 260.

111. Henn-Jüri Uibopuu, *Interpretation of Treaties in the Light of International Law: Art. 31, Para. 3(c) of the Vienna Convention on the Law of Treaties*, 40 ANNUAIRE DE L’A.A.A. 1, 4 (1970); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 265 (2d ed. 1997).

112. GARDINER, *supra* note 23, at 260 (emphasis added) (including as examples of relevance going beyond subject matter, *inter alia*: completing the legal picture, or filling gaps, in a treaty by reference to general international law; deriving guidance from parallel treaty provisions; or resolving conflicting obligations arising under different treaties).

Matters between them.¹¹³ “It is fair to conclude,” in their view, “that treaty interpreters are free to embrace the flexibility inherent in the term ‘relevant.’”¹¹⁴

With respect to this aspect of the rule, *Demir & Baykara* does not itself reflect a particularly broad approach. The Court considered only external sources that could be fairly deemed “relevant” under any construction. The various international and European instruments considered all concern the same labor rights at issue in Article 11 of the ECHR—the freedom of association and the right to bargain collectively. However it bears noting that the ECtHR has elsewhere adopted the broader approach to the “relevance” component of 31(3)(c)—most notably in a trio of judgments on state immunity.¹¹⁵ In each of those three cases the Court employed the same language, reasoning that the Convention must be interpreted in light of the Vienna Rules, and in particular “Article 31(3)(c) The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including to those relating to the grant of State immunity.”¹¹⁶ Thus, the Court considered the general international law of immunity relevant to the interpretation of the scope of the human rights in the Convention—not because they address the same subject but, presumably, to resolve a potential conflict between those regimes.¹¹⁷

113. *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, Judgment, 2008 I.C.J. 177, ¶ 113 (June 4).

114. *Simma & Kill*, *supra* note 20, at 696. *Simma and Kill* further note that, for textual reasons, VCLT 31(3)(c) should at least be understood as having a broader ambit than other treaties with the same subject matter. The term “relating to the same subject matter” appears as an express qualifier in Article 30 on successive treaties. Thus, they reason, the use of the more general term “relevant” in Article 31(3)(c) should be interpreted in light of the choice not to employ the more specific “subject-matter” qualification. *Id.* at 695–96.

115. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. ¶¶ 55–56; *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. ¶¶ 35–36; and *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. ¶¶ 36–37.

116. *Al-Adsani*, 2001-XI Eur. Ct. H.R. ¶ 55. “It follows,” the Court continues, “that measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1).” *Id.* ¶ 56; *Fogarty*, 2001-XI Eur. Ct. H.R. ¶¶ 35–36; and *McElhinney*, 2001-XI Eur. Ct. H.R. ¶¶ 36–37.

117. See *Fragmentation Report*, *supra* note 18, at 221, ¶ 438 pointing out that, in these cases, the ECtHR “might have simply brushed aside State immunity as not relevant to the application of the Convention.” But instead of doing so it took the possibility of conflict head on by opting to integrate Article 6 in its normative environment. “The right provided under the European Convention was weighed against the general interest in the maintenance of the system of State immunity. In the end,” the ILC’s Report correctly

While the Court does indeed appear to adopt a broader reading of relevance in its case law, it should not be seen as swimming far beyond the general understanding of the scope of VCLT 31(3)(c) in this regard, as is reflected in recent scholarship and international judicial practice. The same cannot be said of the Court's expansive reading of the remaining two elements of the rule.

B. "Any . . . Rules of International Law"

The ambiguity of this element—what counts as a rule of international law—is a matter of durability: how soft may a norm be or how hard must it be to qualify as a rule of international law in the sense of VCLT 31(3)(c)? Here too the Court adopts a broad construction of the ambit of the technique—systematically articulating and extending its broad reading of “rules of international law” in *Demir & Baykara*. By contrast to the Court's broad reading of “relevance,” however, the ECtHR's construction of “rules of international law” goes far beyond the positions usually articulated in the literature.

In general the scope of “rules of international law” in VCLT 31(3)(c) seems relatively clear. Most scholars agree that it simply reflects the traditional list of sources codified in the Statute of the ICJ at Article 38(1): customary international law, other treaties (subject to their being “applicable”), and general principles of law.¹¹⁸ Most also seem to agree that the provision should not extend any further. The *Fragmentation Report* states that the provision refers here to “rules of law, and not to broader principles or considerations which may not be firmly established as rules.”¹¹⁹ In this regard Simma and Kill warn of the susceptibility of international human rights law “to ‘rights creep,’ that is, to ambitious expansion of the claimed liberties and entitlements cognizable as human rights.”¹²⁰ In light of such tendencies, they contend, “[t]ribunals should

notes, “the Court used article 31(3)(c) to set aside, in this case, the rules of the Convention.” See also GARDINER, *supra* note 23, at 260 (arguing that the resolution of potential conflicts is a legitimate use of 31(3)(c)).

118. *Fragmentation Report*, *supra* note 18, ¶ 426; GARDINER, *supra* note 23, at 267–68; Simma & Kill, *supra* note 20, at 695; McLachlan, *supra* note 20, at 290–91; see also Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.67, WT/DS291-293/R (Sept. 29, 2006) [hereinafter Panel Report, *EC-Biotech*] (“Textually, this reference seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the general principles of law.”).

119. *Fragmentation Report*, *supra* note 18, ¶ 426.

120. Simma & Kill, *supra* note 20, at 695.

establish that the rights being advanced as external rules of law do in fact exist as rules of law.”¹²¹

The ECtHR, however, marches far beyond the border of the list of sources in the ICJ Statute. The Court affirms, first, that VCLT 31(3)(c) justifies taking into account the traditional sources—customary international law, other conventions, and general principles.¹²² However the Court quickly and stridently goes beyond, articulating systematically the wide range of sources it has taken and is currently willing to take into consideration for the purposes of interpreting the Convention.

The Court first looks to the output of other CoE organs, including “intrinsically nonbinding instruments” emanating from the plenary representative bodies (in which all of the Parties to the ECHR are represented).¹²³ Here, at least, the Parties to the ECHR retain some voice in the promulgation of such instruments, but the Court’s construction of 31(3)(c) goes significantly further. The Court asserts competence to consider “intrinsically non-binding” norms emanating from other CoE organs, “even though those organs have no function of representing States Parties to the Convention,”¹²⁴ including the work of the European Commission for Democracy through Law (or “Venice Commission”);¹²⁵ the European Commission against Racism and Intolerance;¹²⁶ and the Reports of the European Committee for the Prevention of Torture and Degrading Treatment.¹²⁷

121. *Id.*

122. And indeed it has given weight to such sources on several occasions. *See, e.g.*, *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 88 (1989) (relying on the ICCPR); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. ¶¶ 50–60 (relying on the CIL of State Immunity); *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) ¶ 35 (1975).

Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken . . . of “any relevant rules of international law applicable in the relations between the parties”. Among those rules are general principles of law and especially “general principles of law recognized by civilized nations.”

Id. (citing Statute of the International Court of Justice, art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993).

123. *Demir & Baykara v. Turkey*, App. No. 34503/97, 48 Eur. H.R. Rep. 54, ¶ 74 (2008). The Court has considered, for example, “intrinsically non-binding” recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe (“CoE”). *See, e.g.*, *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. ¶¶ 59, 71, 90, 93.

124. *Demir*, 48 Eur. H.R. Rep. ¶¶ 74–75.

125. *See, e.g.*, *Russian Conservative Party of Entrepreneurs v. Russia*, 46 Eur. Ct. H.R. 863, 873 (2007).

126. *See, e.g.*, *Bekos & Koutropoulos v. Greece*, 2005-XIII Eur. Ct. H.R. ¶¶ 33–36.

127. *See, e.g.*, *Slimani v. France*, 2004-IX Eur. Ct. H.R. 396, ¶¶ 9, 22–26 (Fr.).

Finally, in applying 31(3)(c) to the case at hand, the Court goes beyond the CoE regime altogether and considers the non-binding interpretations, observations, and recommendations of two committees of the ILO: the Committee of Experts on the Application of Conventions and Recommendations;¹²⁸ and the Committee on the Freedom of Association.¹²⁹ The Court thus extends its use of VCLT 31(3)(c), here, to the consideration of the explicitly non-binding product of committees of an international organization with whom it has absolutely no institutional connection.¹³⁰

In *Demir & Baykara* the Court articulates an expansive list of types of sources it considers itself competent to consider, ranging from the hard to the very soft. The Court recognizes that it is in principle limited to applying the Convention; yet it asserts here that it can only do so properly, in light of the mandatory terms of VCLT 31(3)(c), if it also considers a manifold of international instruments ranging from the hardest treaties to the softest recommendations and interpretations by the organs of utterly unrelated international organizations.

C. “. . . Applicable in the Relations between the Parties”

The main problem in determining applicability, as framed succinctly by the *Fragmentation Report*, is whether it is “necessary that *all* the parties to the treaty being interpreted are also parties to the treaty being relied upon as the other source of international law for interpretation purposes.”¹³¹ Is it sufficient that the external rule is applicable to the parties

128. *Demir*, 48 Eur. H.R. Rep. ¶¶ 101, 147 (citing CEACR, Individual Observation, *supra* note 88).

129. *Id.* ¶ 102 (relying on a recommendation of the Committee, see ILO, *General Survey*, *supra* note 98).

130. See JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 224–29 (2005) (noting that such observations and recommendations, though non-binding in a legal sense, may exert a strong compliance-pull from the individual States to whom they are directed, especially because they are attached to onerous reporting requirements). But such political influence aside, these instruments cannot be said to be in any way hard law under the public international law doctrine of sources. *Id.*

131. *Fragmentation Report*, *supra* note 18, ¶ 470; see also GARDINER, *supra* note 23, at 265 (Gardiner feels compelled to emphasize that here, unlike the other elements of VCLT 31(3)(c), there is no hope to resolve the ambiguity in this particular element through textual analysis); Simma & Kill, *supra* note 20, at 696. Simma and Kill suggest that the notion of “applicable” actually entails three distinct sub-issues. Beyond the question of “which parties,” the term raises the issue of intertemporality—when must the rules be applicable, at the conclusion of the treaty or at the time of application/interpretation? *Id.* at 696. And finally, the meaning of applicable “as a legal term of art”—does applicable mean “in force” or “binding,” or something more flexible? *Id.* at 697. I leave these two sub-categories out of the main analysis, here, for distinct reasons. First, as to intertemporality, the issue has basically ceased to be controversial. As Simma and Kill them-

to the dispute? Or must the external rule be applicable to all or even a high proportion of the parties to the treaty under interpretation? If the latter, coming full circle, is it even necessary that the external rule be applicable to the parties to the dispute? The problem becomes particularly acute in the interpretation of multilateral treaties with wide membership.¹³² Finally, to complicate things exponentially, it might be asked whether the rule is the same for all kinds of multilateral treaties? Both the scholarship and occasional international judicial decisions on point evince a weaker consensus on the meaning of “applicability” than with regard to the other elements of VCLT 31(3)(c). And still, *Demir & Baykara* represents a step beyond the broadest constructions generally put forth.

As a preliminary matter, the ambiguity in “applicability . . . between the parties” arises mainly in reliance on external treaties because, for the most part, general principles and customary international law will be ap-

selves recognize, most international courts and tribunals, as well as commentators, today recognize the possibility that VCLT 31(3)(c) envisions the possibility of considering developments in international law in the interpretation and reinterpretation of a treaty. *Id.* at 696. It may have been generally accepted that treaties were generally static before the conclusion of the Vienna Convention. See Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1, 5 (1953). However since 1969 the presumption has clearly shifted, replaced by the notion that the parties' intent, as reflected in the terminology employed or the treaty's object and purpose, should control the issue of whether a treaty is susceptible of evolutive interpretation. See most recently, the practice of the ICJ in the last two years, for example, *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 1, ¶ 145, 171–74 (Apr. 20). While I leave out the issue of intertemporality because it simply appears no longer controversial, I omit the issue of applicability because the analysis would be redundant. Simma and Kill note that on a purely textual basis the term may imply more flexibility than “in force” or “binding.” Simma & Kill, *supra* note 20, at 697–98. Note, however, that they advocate caution, insisting that their comments “should not be taken as a basis for a liberal doctrine of ‘applicability’ under Article 31(3)(c) without further research.” *Id.* at 698. Nevertheless, problematizing “applicability” in this way appears to introduce exactly the same ambiguity as arises in the interpretation of “rules”—i.e. is the term flexible enough to include norms of a softer nature? Rather than repeat the analysis for each term, suffice it to say that VCLT 31(3)(c) appears to include several terms that could, if interpreted flexibly, permit consideration of soft-law.

132. *Fragmentation Report*, *supra* note 18, ¶ 471.

Bearing in mind the unlikelihood of a precise congruence in the membership of most important multilateral conventions it would become unlikely that any use of conventional international law could be made in the interpretation of such conventions . . . in practice the result would be the isolation of multilateral agreements as ‘islands’ permitting no references *inter se* in their application.

Id.

plicable to all the parties to the treaty under interpretation.¹³³ It bears noting, however, that analogous issues may arise where the external rule of CIL is one to which one or some of the parties are persistent objectors,¹³⁴ or where it constitutes a rule of “regional custom” opposable only to some of the parties to the treaty.¹³⁵ But for purposes of clarity I follow, here, the general approach in the scholarship to limit analysis of the problem of “which parties” to the reliance on external treaties.

McLachlan helpfully canvasses four possible readings of “applicable . . . between the parties,” representing the views most frequently asserted in the fragmented scholarship and judicial opinions construing this element of VCLT 31(3)(c).¹³⁶ The provision, to paraphrase, may

- (a) Require that *all parties to the treaty* under interpretation also be parties to any treaties relied upon (a clear but very narrow standard);¹³⁷
- (b) Permit reference to another treaty provided that the treaty parties in *dispute* are also parties to the other treaty (a much broader standard, which runs the risk of engendering inconsistent interpretations of the treaty under interpretation);
- (c) Require that all parties to the treaty also be parties to any treaties relied upon (as in (a)) *except* in case of an external

133. Simma & Kill, *supra* note 20, at 698 (“In the case of rules deriving from general customary law and general principles, this question of ‘applicability’ presents relatively little complication. By their nature, rules originating in these sources are applicable, indeed binding, in the relations among all States.”); *see also Fragmentation Report, supra* note 18, ¶¶ 463–69.

134. On persistent objectors, see Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 130–31 (Dec. 18); Asylum Case (Colom./Peru), Judgment, 1950 I.C.J. 266, 277–78 (Nov. 20).

135. On the possibility of regional custom, having the same general character as customary international law but applying only to States of a certain region, see *Asylum Case*, 1950 I.C.J. at 277.

136. *See also* McLachlan, *supra* note 20, at 314–15.

137. This most narrow approach has been adopted by a panel of the WTO in *EC-Biotech*. Panel Report, *EC-Biotech*, *supra* note 118, at ¶¶ 7.70–7.71.

[W]e think it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted [I]t is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.

Id.

treaty that reflects customary international law (understanding that this approach may be materially broader than (a) because any such “reflective” treaty may entail some degree of progressive development of the CIL rule);
or

- (d) Require, in absence of complete identity between the treaties, that the external rule can be said to be implicitly accepted or tolerated by all parties to the treaty under interpretation.¹³⁸

McLachlan and the *Fragmentation Report* adopt different approaches based on the above, complicated even further by taking into consideration the type of treaty provision being interpreted. McLachlan argues that only options (a) and (c) are appropriate, except where the norms of the multilateral treaty under interpretation are “bilateral” or “reciprocal” by nature, as opposed to “absolute” or “integral” obligations owed *erga omnes partes* (to all of the parties) or even *erga omnes* (to the international community as a whole).¹³⁹ In other words, if the multilateral treaty is composed of a web of reciprocal obligations, then it may be legitimately “bilateralized” through interpretation on the basis of external rules applicable to the parties to the dispute, but not necessarily the parties at large, without risk of prejudicing the latter’s rights on the basis of obligations to which they did not consent.¹⁴⁰ The presumption is the narrow construction, except in case of bilateral obligations in multilateral treaties.

The *Fragmentation Report* takes the opposite view, insisting that the overly narrow positions would pose a serious risk of fragmentation in international law.¹⁴¹ “Bearing in mind the unlikelihood of a precise congruence in the membership of most important multilateral conventions,” the *Report* notes with concern, “it would become unlikely that any use of conventional international law could be made in the interpretation of such conventions . . . in practice the result would be the isolation of mul-

138. McLachlan, *supra* note 20, at 314–15. Simma and Kill admit that this may be a viable interpretation, though stop short of adopting it. Simma & Kill, *supra* note 20, at 697–98. Pauwelyn supports the approach in the context of the WTO Covered Agreements. JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* 257–63 (2003).

139. Some examples of integral obligations are entailed by certain treaty provisions undertaken by states to protect human rights or in some cases, the environment. See McLachlan, *supra* note 20, at 315; Special Rapporteur on the Law of Treaties, *Third Rep. on the Law of Treaties*, arts. 18–19, Int’l Law Comm’n, U.N. Doc. A/CN.4/115 (Vol. II) (Mar. 18, 1985) (by Gerald Fitzmaurice).

140. See McLachlan, *supra* note 20, at 315; Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT’L L. 907, 911 (2003).

141. *Fragmentation Report*, *supra* note 18, ¶¶ 471–72.

tilateral agreements as ‘islands’ permitting no references *inter se* in their application.”¹⁴² A better view, the *Report* suggests, is (b) requiring only that the external rule be applicable to the parties to the dispute—even at risk of divergent interpretations. By way of exception, the *Report* concedes, where the norm under interpretation is an integral one it should not be interpreted in light of external rules not-applicable to all the parties if divergent interpretations of said norm would “threaten the coherence of the treaty to be interpreted.”¹⁴³ And even then, the *Report* continues, the interpreter should consider (d), whether the other parties to the treaty have implicitly accepted or tolerated the external treaty rule.¹⁴⁴ The presumption of the *Fragmentation Report* is a broad construction of VCLT 31(3)(c), except in the case of some integral norms where divergent interpretations would threaten the coherence of the regime and the other parties cannot be said to have acquiesced in the external rule not formally applicable to them.

Here too, the ECtHR finds a way to adopt an even broader approach than those envisioned in the scholarly debates. Having noted earlier the absolute (integral) nature of the provisions of the ECHR,¹⁴⁵ the Court applies 31(3)(c) to the Convention in *Demir & Baykara* as permitting the consideration of any relevant rules of international law “applicable in relations between the *Contracting Parties*.”¹⁴⁶ This may appear a narrow construction at first glance (akin to either McLachlan’s approach, or the even more narrow construction categorically requiring the identity of parties to all treaties involved). However the Court adds an all-important proviso: it does not distinguish “between sources of law according to whether or not they have been signed or ratified by the respondent State.”¹⁴⁷ Instead, the Court considers its task under VCLT 31(3)(c) to be “searching for common ground among the norms of international law.”¹⁴⁸ To that effect it is not necessary that all the parties to the Convention are parties to the external instrument under consideration, nor is it even

142. *Id.* ¶ 471.

143. *Id.* ¶ 472.

144. *Id.*; see also PAUWELYN, *supra* note 138, at 257–63.

145. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 90, ¶ 239 (1978) (“Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations.”).

146. *Demir & Baykara v. Turkey*, App. No. 34503/97, 48 Eur. H.R. Rep. 54, ¶ 67 (2008).

147. *Id.* ¶ 78.

148. *Id.*

“necessary for the respondent State to have ratified the entire collection of instruments that are applicable.”¹⁴⁹

It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.¹⁵⁰

Sure enough, the Court relies upon several instruments that it acknowledges have not been ratified by Turkey (against the latter state’s predictable and express objections),¹⁵¹ including Articles 5 and 6 of the European Social Charter,¹⁵² and the European Union’s Charter of Fundamental Rights (with no small irony, given Turkey’s perennially frustrated attempts to join the E.U.).¹⁵³

Thus the ECtHR’s approach in *Demir & Baykara* represents an extraordinarily broad construction of the final element of VCLT 31(3)(c): an integral treaty may be interpreted in light of external norms in spite of the fact that some parties to the it, including even the parties to the dispute, have not ratified or signed the external agreement.

D. Transformation through Interpretation

VCLT 31(3)(c) entails three main ambiguities: (1) what is the scope of “relevant” rules, (2) how hard or soft may these rules be, and (3) to which parties must the rule be applicable. In each case the Court has adopted a maximally broad reading by not limiting itself to the consideration of rules of the same subject matter, making use of the softest of instruments, observations, and interpretations, and taking into consideration rules applicable to only a minority of the Parties to the Convention, not even including the Respondent in the particular dispute. And the breadth of this approach actually appears more or less decisive in *Demir & Baykara* in determining the second issue, as to whether Article 11

149. *Id.* ¶ 86 (citing *mutatis mutandis* its earlier judgment in *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) ¶ 41 (1979)) (not explicitly relying on 31(3)(c), but nevertheless taking into consideration two treaties signed by just ten, and ratified by a mere four States Parties to the ECHR—treaties which even admit of reservation on the precise point in question. The Court took these treaties, recognizing the equal rights of children born out of wedlock, as evidence of the evolving views in “modern societies” along with the recognition of such right in the “great majority” of CoE States).

150. *Id.* ¶ 86.

151. *Id.* ¶¶ 61–62 (Turkey was not a party to Article 5 (the right to organize) or Article 6 (the right to bargain collectively), though it had ratified the rest of the Charter in 1989).

152. *Id.* ¶¶ 62, 103, 149.

153. *Id.* ¶¶ 105, 150.

(freedom of association) includes the right to bargain collectively, the Court relies on only the non-binding interpretations of the ILO Committee of Experts of Convention No. 98, and two Conventions not ratified by the Respondent State—the European Social Charter and Charter of Fundamental Rights of the European Union.¹⁵⁴

The Court's position may be thrown into relief by way of contrast to the stark words of the WTO Panel in *EC-Biotech*. There, the Panel framed its concern about a broad reading of “applicable . . . between the parties” in terms of State consent. As the Panel stressed,

It is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.¹⁵⁵

The ECtHR, in adopting an extraordinarily broad interpretation of the ECHR asserts instead, by implication, that in acceding to this particular human rights treaty, composed of absolute (integral) norms, the States Parties have given up a great deal of their control over which precise external norms of international law they will be bound to obey.

Demir & Baykara thereby represents, beyond a broad and dynamic interpretation of Article 11, a more reflexive assertion of the Court's constitutional authority over the States under its charge. Though the exercise of such competence may have always been juridically possible under the broad terms of the Court's formal constituent instrument, the assertion of said competence in a particular case represents a transformation in the material sense. Whether or not the Court always might have been able to hold the member States accountable to technically non-binding external standards, *Demir & Baykara* makes clear the Court's willingness to do so today. As such it represents the capstone of transformative line of jurisprudence. The Court's interpretive practice under VCLT 31(3)(c), culminating in *Demir & Baykara*, demonstrates the critical and politically sig-

154. The only other instrument it considers, ILO Convention No. 151, is not quite apposite because it requires States to encourage and promote bargaining with “public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.” See Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service art. 7, June, 6, 1978, ILO No. 151 (emphasis added). This seems wholly consistent with the Court's old rule, in *Swedish Engine Drivers*, which held that Article 11 required the State to give workers' organizations voice, but not necessarily the right to bargain collectively. *Swedish Engine Drivers' Union v. Sweden*, 20 Eur. Ct. H.R. (ser. A) at 628, ¶ 39 (1976).

155. Panel Report, *EC-Biotech*, *supra* note 118, ¶ 7.71.

nificant shift from potentiality to actuality. In other words, from the political point of view—as against a formal-juridical perspective—this shift represents a transformation of the material constitution of the European Court of Human Rights.

CONCLUSION

I hope to have shown that the ECtHR's approach to 31(3)(c) has grounded not only the dramatic expansion of certain Convention rights, but also a more reflexive transformation of the Court's constitution. The two dimensions of its interpretive approach are mutually reinforcing: first the Court relies on a broad construction of VCLT 31(3)(c) to justify its assertion of competence to consider an extraordinarily wide variety of external sources in interpreting the Convention, ranging from clearly applicable law to quasi-legal instruments and external interpretations; and secondly it actually relies on the full panoply of such sources, via VCLT 31(3)(c), to develop the substantive rights of the Convention through highly expansive and dynamic interpretation. In short *Demir & Baykara* illustrates how the Court has relied on a maximally broad construction of VCLT 31(3)(c) to both expand the substantive rights of the Convention, and transform its constitutional competences.

Formally speaking it might be said that the Court always had, in principle, the broad competence to authoritatively interpret the Convention as it sees fit on the basis of the ECHR alone. It has, after all, the formal competence to decide for itself the extent of its jurisdiction in the interpretation of the Convention—i.e. judicial *Kompetenz-Kompetenz*.¹⁵⁶ However two points remain critical. First, it is already crucial to note how the court actually makes use of its capacious formal competence. Through its interpretive practice, the Court's competence to apply an enormous array of external rules is not merely a formal-juridical possibility, but a political fact. Second, and equally importantly, the Court does not assert its broad competence to interpret the Convention in light of external sources by simple fiat—resting on its broad grant of interpretive competence. Rather it articulates and justifies its broad assertion of competence to develop the Convention in light of such myriad sources on the basis of the codified international law of treaties. It at least attempts to legitimate its assertion of broad competence in legal terms—by appeal to the general international law of treaty interpretation as codified in the Vienna Convention. The Court justifies its expansive assertion of competence on the basis of a remarkably, but not impossibly, broad construction of its obligations as an interpreter under VCLT 31(3)(c).

156. ECHR, *supra* note 2, art. 32(2).

Ultimately, the Court is here asserting a competence over and above the States Parties. It claims the competence to consider, in the expansive and evolutionary interpretation of the Convention, what it perceives to be trends in international, regional, and domestic mores as evidenced by an array of hard and soft law, irrespective of whether states have agreed to be formally bound by those instruments or whether the instruments were even meant to be binding. The Court is thereby saying that it is more concerned with developing the Convention in light of trends in “modern societies” writ large, than in light of the immediate consent of the States Parties to any given change. In other words, if it considers a state to be a laggard, measured against contemporary international human rights standards, the Court will not be dissuaded from giving the Convention an evolutive interpretation in light of those standards by cries of the absence of state consent.¹⁵⁷ By signing on to the absolute and objective obligations of the ECHR, the Court reasons, the Parties have given up plenary control over the extent of their human rights commitments.

I hope to have illustrated one way in which international organizations rely on the general international law of treaty interpretation to expand their competences. In conclusion, I propose two areas for further research.

First, I want to emphasize that this study of *Demir & Baykara* has been intended to merely illustrate a process of informal constitutional change through interpretation—a process that has occurred elsewhere, and will in all probability continue to occur in international organizations much more generally. The story does not end with either the ECtHR or VCLT 31(3)(c). A similar phenomenon can be perceived in other courts and tribunals with regard to other codified techniques of treaty interpretation over time—as, for example, the ICJ’s reliance on an expansive interpretation of VCLT 31(3)(b) in reinterpreting, and arguably modifying, its constituent instrument, the U.N. Charter. VCLT 31(3)(b) requires the consideration of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”¹⁵⁸ In *Certain Expenses* the Court read this provision as permitting it to consider, when interpreting the constituent instrument of an international organization, the “practice” of that organization’s organs (where

157. Indeed in *Demir & Baykara* the Court explicitly ruled out Turkey’s objection that it could not indirectly give effect to external legal sources to which Turkey had not consented to be bound through expanding the Convention on the basis of VCLT 31(3)(c) (i.e., in particular, Articles 5 and 6 of the European Social Charter). See *Demir & Baykara v. Turkey*, App. No. 34503/97, 48 Eur. H.R. Rep. 54, ¶¶ 61–62, 78, 86 (2008).

158. VCLT, *supra* note 7, art. 31(3)(b).

coupled with the acquiescence of the Parties).¹⁵⁹ The Court relied on this construction of VCLT 31(3)(b) again in the later *Namibia* opinion, in order to justify its famous interpretation (or by many accounts modification) of Article 27(3) of the Charter.¹⁶⁰ On the basis of the longstanding practice of the Security Council, the Court reasons that the Article's requirement of the concurring votes of the five permanent members of the Council for passing a Resolution includes *either* an affirmative vote or an abstention—i.e. the absence of a negative vote. The jurisprudence of the ICJ thus illustrates a transformation similar to that effected by the ECtHR through 31(3)(c)—the ICJ asserts a broad construction of 31(3)(b), and relies on that construction to dramatically interpret (and arguably modify) its constituent instrument. In so doing, it asserts a broad competence to develop the Charter through interpretation in light of “the practice of the organization.”¹⁶¹

The practice of other international courts and tribunals in interpreting their own constituent instruments may thus provide a fruitful area for further research, specifically with respect to how they rely on the various techniques of transformative interpretation over time—including subsequent agreement (VCLT 31(3)(a)), subsequent practice (VCLT 31(3)(b)), and evolutive interpretation based on either object and purpose (VCLT 31(1)), or external rules (VCLT 31(3)(c)).

I want to suggest, finally, that one court's expansive construction of VCLT 31(3)(c), or any other technique, might have normative ripples beyond its own regime. The second area for future research thus concerns a horizontal issue of interpretation across treaty regimes: to what extent do (or might) various courts and tribunals rely on one another's constructions of the Vienna Rules of treaty interpretation to develop their own constituent instruments?¹⁶² Howse and Teitel have demonstrated the high level of dialogue among the ever-proliferating international courts and tribunals,¹⁶³ and I have argued elsewhere that such courts rely on one

159. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 157 (July 20); *see also* *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 26–27 (July 9).

160. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶¶ 21–22 (June 21).

161. *Id.*

162. *See* Arato, *Subsequent Practice*, *supra* note 26, at 447, 487–93 (2010).

163. *See* Ruti Teitel & Rob Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 951, 988–89 (2009); *see also* José E. Alvarez, *A (BIT) on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 45–48 (2009) (noting the particularly dramatic frequency of such borrowing among ad hoc tribunals in the context of investor-state arbitration).

another's construction of the contours of various techniques of interpretation over time.¹⁶⁴ Moreover, there can be no doubt that scholars rely heavily on international case law in expounding the meaning of the various techniques of interpretation. Through such dialogue, a once astonishing construction may be normalized over time.

Taking these further questions together, I want to suggest by hypothesis that it is possible to trace the development, through the practice of international courts and tribunals interpreting their own constituent instruments, of a more or less general use of interpretive techniques to effect constitutional transformation. What bears further research is both how this process differs in different international courts and tribunals; and whether and to what extent horizontal dialogue between these diffuse courts acts as a catalyst in this process—particularly to what extent judicial bodies rely on one another's constructions of the various techniques of interpretation over time in the interpretation of their own constitutions.

164. See, for example, the Inter-American Court of Human Rights' reliance on the ECtHR's judgment that human rights treaties, by virtue of their object and purpose, are susceptible of evolutive interpretation. *The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A). No. 16, ¶ 114 (Oct. 1, 1999) ("The European Court of Human Rights...has held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.") (citing *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) ¶ 75 (1995) (suggesting that interpretation of the ECHR must be based upon that treaty's object and purpose as a "constitutional instrument of European public order"))).